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No. 80-885

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
MALLEABLE IRON RANGE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

Page

Cases:

Falk v. *Brennan*, 414 U.S. 190 3

FPC v. *Idaho Power Co.*, 344 U.S. 17 4

FTC v. *Colgate-Palmolive Co.*, 380 U.S. 374 3

FTC v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 ..... 4, 5

Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251 3

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 3

Mercer v. *Theriot*, 377 U.S. 152 3

Reece v. *Georgia*, 350 U.S. 85 2-3

United States v. *Adams*, 383 U.S. 39 5

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Respondent Hendricks County Rural Electric Membership Corporation ("Hendricks") contests (Br. in Opp. 7-10) the timeliness of the Board's petition for a writ of certiorari in *Hendricks*, claiming that the standard for determining the status of "confidential employees" under the National Labor Relations Act was initially decided by the court of appeals in *Hendricks I*, and that the Board was therefore required to seek review of that issue within 90 days of entry

of judgment in *Hendricks I*, rather than awaiting that court's final judgment in *Hendricks II*.[1] There is no merit to this contention.

1. As fully set forth in the petition (Pet. 5-11), the Board, in its initial decision in *Hendricks*, found that Mary Weatherman was not a "confidential employee" excluded from the protection of the statute because she did not act in a confidential capacity with respect to labor relations (Pet. App. 44a-49a). The court of appeals sustained the finding that Weatherman lacked a "labor nexus," but held that the Board's use of the "labor nexus" test was "an error of law" and remanded the case to the Board for reconsideration under a broader standard of confidentiality, "without regard to labor relations [matters]" (*id.* at 27a, 31a). The Board accepted the remand and determined that Weatherman was not a "confidential employee" even under the court's broader standard (*id.* at 19a-20a). The court of appeals thereafter denied enforcement, restating its rejection of the "labor nexus" test (*id.* at 3a-6a), and holding that the Board's factual determination that Weatherman was not a "confidential employee" under the court's broader test was not supported by substantial evidence (*id.* at 6a-8a). The Board now seeks review of the judgment entered by the court pursuant to its second decision (*id.* at 14a-15a).

2. Although the Board could have sought review of the court of appeals' rejection of the "labor nexus" test based on the judgment in *Hendricks I*, its decision to accept the remand poses no bar to review of that issue at this time. It is well settled that a petition timely filed with respect to a final judgment rendered by a lower court vests plenary jurisdiction in this Court over "all of the substantial federal questions determined in the earlier stages of the litigation."

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[1]The judgment in *Hendricks II* (Pet. App. 14a-15a) was entered on July 21, 1980, almost one year after the court of appeals rendered its decision in *Hendricks I* (see *id.* at 22a).

Reece v. *Georgia*, 350 U.S. 85, 87 (1955). See also *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1964); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916). Cf. *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973).

The soundness of this rule, and its consistency with established principles of orderly and prudential judicial review, is manifest here. If the court of appeals had sustained the Board's post-remand finding that Weatherman was not a "confidential employee" even under the broader standard, the court would have enforced the Board's order. Thus, there would have been no need, in the *Hendricks* case, for this Court to resolve the question whether the Board or the court below was correct as to its definition of "confidential employee." The principle that courts should not review issues "until they have to" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 155 (1951) (Frankfurter, J., concurring)) is particularly apt where, as here, the lower court has created a new, broadly applicable rule of law, the scope of which had not yet been tested by any factual application. Indeed, the striking exclusionary sweep of the standard articulated in *Hendricks I* was not evident until it was applied in *Hendricks II*, where the court based its conclusion that Weatherman was not protected by the Act on a record which, as the dissent noted (Pet. App. 10a), showed that she was responsible for only one clearly confidential task: the processing of employee medical and disability insurance claims, the possible disclosure of which was not likely to put her employer to any competitive disadvantage. With the case in its present posture, this Court can better evaluate the practical significance of the legal standard adopted by the court below. Compare *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 383-384 (1965) (post-remand review appropriate where remand proceedings served to sharpen focus of dispute between court of appeals and agency).

3. Hendricks contends that this case falls within the rule that an administrative agency may not accept a remand from the court of appeals, " 'merely restate its former position in a new order[,] and then apply for certiorari when the court of appeals reiterates its previous objection' " (Br. in Opp. 8; citation omitted). That rule, however, has no application here. The Board accepted the remand in *Hendricks I* and expressly applied to the particular facts the broad standard articulated in that decision as "the law of th[e] case" (Pet. App. 19a). Similarly, there is no merit to Hendricks' suggestion that the court of appeals " 'did no more by [its] second judgment than to restate what it had decided by the first one' " (Br. in Opp. 8; citation omitted). As we have shown, the court in *Hendricks II* determined that the record evidence required Mary Weatherman's exclusion from the Act (Pet. App. 6a-8a), a question which the court expressly left open in *Hendricks I* (*id.* at 31a). Compare *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952) (review appropriate where court's second judgment modified in relevant part terms of first judgment).[2] Finally, it is true

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[2]Contrast *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), where the second judgment did not alter the first in *any* relevant respect. In that case, the FTC issued an order remedying separate violations of the Robinson-Patman Act, 15 U.S.C. 13(a), the Federal Trade Commission Act, 15 U.S.C. 45, and the Clayton Act, 15 U.S.C. 14. The court of appeals entered a judgment setting aside the Robinson-Patman portion of the order, and, subsequently, the agency moved to amend the judgment to reflect enforcement of the other portions of the order. The court of appeals amended the judgment accordingly, but simply restated the prior judgment with respect to the Robinson-Patman issue. The agency sought certiorari on that issue within 90 days of entry of the amended judgment, but more than five months after the court had issued the first judgment. 344 U.S. at 207-210. This Court dismissed the petition, holding that "the mere fact that [the] judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *Id.* at 211.

that the legal issue presented here was resolved in *Hendricks I*, and left undisturbed in *Hendricks II*, but review of this issue is nevertheless appropriate now because Hendricks' liability under the Board's reinstatement and backpay order was "inextricably linked with the [evidentiary issue,] which was not determined until the [second] judgment." *United States* v. *Adams*, 383 U.S. 39, 41-42 (1966) (distinguishing *Minneapolis-Honeywell*, discussed *supra*, note 2, as involving separate judgments on substantively unrelated issues).

For these reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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TABLE OF AUTHORITIES

Cases: Page

B.F. Goodrich, 115 NLRB 722 (1956) 4
Bell Federal Savings, 214 NLRB 75 (1974) 6
Complete Auto Transit, Inc. v. Reis, 49 U.S.L.W. 4473 (1981) 7
Ford Motor Co. v. NLRB, 441 U.S. 488 (1979).... 4
NLRB v. Bell Aerospace Company, Division of Textron Inc., 416 U.S. 267 (1974) 7
Ridgley Manufacturing Co., 207 NLRB 193 (1973) 6
Snepp v. United States, 444 U.S. 507 (1980) 6
W.R. Grace Company, 240 NLRB No. 117 (1979).. 6

Statutes:

National Labor Relations Act, 29 U.S.C. § 151 et seq. Criminal Code, 18 U.S.C. § 798 2

Legislative History:

H.R. 3020, 80th Cong., 1st Sess. (1947) 4
H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947).. 7

Miscellaneous:

Dispatch Services Inc., 67 LA 632 (1976) 6
Factory Services Inc., 70 LA 1088 (1978) 6
William Feather Co., 68 LA 13 (1977) 6
Firestone Retread Shop, 38 LA 600 (1962) 6
Moore Business Forms, Inc., 57 LA 1258 (1971).. 6
Pipe Coupling Manufacturers, Inc., 46 LA 1009 (1966) 6
Ravens-Metal Products, Inc., 39 LA 404 (1962).. 6
Southern Bell Telephone & Telegraph Co., 69 LA 582 (1977) 6

TABLE OF CONTENTS

	Page
MOTION	1
Interest of the Amicus Curiae	2
BRIEF	3
Argument	4
Conclusion	7

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR THE UAW AS AMICUS CURIAE

The UAW respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the petitioner in these cases.

While the UAW has been able to secure the written consent of the NLRB and Malleable Iron Range Co., it has been unable to contact counsel for Hendricks County Rural Electric Membership Corporation.

INTEREST OF THE AMICUS CURIAE

The UAW, which represents some 1,250,000 employees, is one of the largest industrial unions in this country with nearly 3000 collective bargaining agreements. Included in its membership are approximately 80,000 technical office and professional employees.

The UAW is vitally interested in the standard applied by the NLRB to determine whether or not an employee is to be excluded as a "confidential employee" from the protection of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (hereinafter the "Act"). Any change in the traditional NLRB test for confidential status could adversely affect the composition of hundreds of UAW bargaining units, in both the blue and white collar industries. The UAW is also actively engaged in clerical organizing campaigns which could suffer a significant set-back due to lengthy litigation and industrial strife if the respondents prevail.

CONCLUSION

For the foregoing reasons we request that the present motion to file this brief amicus curiae be granted.

Respectfully submitted,

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May 16, 1981

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BRIEF FOR THE UAW AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file. The interest of the UAW in these cases is set forth in that motion.

ARGUMENT

For over twenty-five(25) years, the National Labor Relations Board (NLRB) has applied the same legal test to determine whether or not an individual should be excluded from its jurisdiction as a "confidential employee." This test, enunciated in *B.F. Goodrich*, 115 N.L.R.B. 722 (1956) restricts the confidential employee status to those who "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." 115 N.L.R.B. 722 at 724. In these cases the Seventh Circuit rejected this narrow, crafted approach. The Court of Appeals adopts, instead, a broad standard which encompasses anyone who is given information by the employer "that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." *Hendricks County Rural Electric Membership Corporation v. NLRB*, 603 F. 2d 25, 30 (7th Cir. 1979), *quoting* H.R. 3020 § 2(12)(C), 80th Cong., 1st Sess. (1947).

The UAW supports the NLRB's definition of a "confidential employee" and the statutory analysis on which its conclusion rests. This brief *amicus curiae* is submitted to demonstrate the important, practical consequences which hang on the choice between the NLRB's and the Seventh Circuit's test. .

The NLRB standard offers a "bright line" against which an employee's duties can be readily evaluated.[1] *Only if* the individual's job responsibilities involve the realm of labor relations, will the employee become the focus for an intensive look into potential confidential status.

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[1] See Justice Powell's concurring opinion in *Ford Motor Co. v. NLRB*, 441 U.S. 488, 504 (1979).

The Seventh Circuit, on the other hand, advances a test which invites, nay, requires, diffuse inquiry into an employee's job and, worse, offers no clear measure for the result.

The Circuit's test threatens bargaining units, though already established, with industrial strife and litigation.[2] Is a nurse who has access to confidential employee medical records a "confidential employee"? Is a factory clerk, who has access to customer orders, a "confidential employee" simply because that information must be kept from competitors? Is the production worker employed by an aerospace company a "confidential employee" because he or she works on a defense contract and builds a new secret missile? What about the 1700-1800 production workers at Rockwell International who built the 1981 Space Shuttle Orbiter? What of the technical employees, such as stylists and clay modelers, assigned to the engineering divisions, working with crucial, secret plans for new car models which are designed five (5) years in advance of production? Are the test drivers at the secluded auto proving grounds "confidential" as well?

All of these employees handle information which employers would rightfully maintain must be kept secret from groups of other employees, competitors, and the public at large. All of the above jobs are included in one or more long standing bargaining units.[3]

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[2] Armed with the Seventh Circuit's new standard, employers could resurrect the issue of the confidential status of certain employees by refusing to bargain about these classifications in contract negotiations. Unions would then be forced to agree to reduce their membership, pursue unfair labor practice charges and/or strike.

[3] For example, for approximately 10 years, the UAW has represented the clay modelers (industrial sculptors) and stylists at American Motors Corporation. Since 1968 Chrysler Corp. industrial nurses have also been organized by the UAW. The UAW unit of Rockwell production workers in the Los Angeles, California area dates back at least 30 years.

As these examples illustrate, access to confidential information has not obstructed the course of labor relations between the unions and employers involved. As in an unorganized workplace, employers can, and have, easily developed safeguards to protect themselves against abuse of this confidential information. Labor arbitration precedent has upheld disloyalty and/or disclosure of confidential information as just cause for discipline and discharge.[4] Many companies require job applicants to sign a no conflict-of-interest and confidential pledge as a condition of employment.[5] These agreements can be enforced against the employee in a civil action. *See, Snepp v. United States*, 444 U.S. 507 (1980). In the aerospace industry, the employer relies on a security clearance program which involves a more detailed screening of a new hire's personal history than normally conducted.[6] Disclosure of certain defense information may also lead to criminal sanctions against the responsible employee. 18 U.S.C. § 789. Finally, the NLRB refuses to extend the Act's protection to employees who disclose confidential business information or secrets. *E.g., W.R. Grace Company*, 240 NLRB No. 117 (1979); *Bell Federal Savings*, 214 NLRB 75, 78 (1974); *Ridgely Manufacturing Co.*, 207 NLRB 193, 196 (1973).

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[4] *E.g. Factory Services Inc.*, 70 LA 1088 (1978); *Southern Bell Telephone & Telegraph Co.*, 69 LA 582 (1977); *William Feather Co.*, 68 LA 13 (1977); *Dispatch Services Inc.*, 67 LA 632 (1976); *Moore Business Forms, Inc.*, 57 LA 1258 (1971); *Pipe Coupling Manufacturers, Inc.*, 46 LA 1009 (1966); *Ravens-Metal Products, Inc.*, 39 LA 404 (1962); *Firestone Retread Shop*, 38 LA 600 (1962).

[5] For example, at Chrysler Corp. certain prospective employees in The UAW unit must sign a form entitled "Patent Release Form." At Martin-Marietta, UAW members are asked to sign an "Employee Patent and Confidential Information Agreement."

[6] At the UAW bargaining unit at Rockwell, different levels of security clearance apply to different UAW bargaining unit positions, depending on the degree of secrecy desired.

With modern technological developments, the plants of industrial America, not just its corporate offices, are rapidly becoming the repository of trade secrets. The vague "confidential employee" test proposed by the Seventh Circuit would result in wholesale exclusion of rank-and-file workers, quite remote from management and its functions. Such a result conflicts with the legislative history cited in *NLRB v. Bell Aerospace Company, Division of Textron Inc.*, 416 U.S. 267, 283 (1974):

> Most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event."
> [quoting H.R. Report No. 245, p. 23]

Where a wide range of devices and legal remedies is available to protect an employer's legitimate business interest in confidentiality, it should not be necessary to take the drastic approach of excluding workers from coverage under the Act. *See generally, Complete Auto Transit Inc. v. Reis*, —— U.S. ——, 49 U.S.L.W. 4473, 4477 n.18 (1981).

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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